Supreme Court, U.S.
FILED

00-232 JUL 28 2000

OFFICE OF THE CLERK

No. _____

In The

# Supreme Court of the United States

KEN FELIS,

*Petitioner,*

v.

STATE OF VERMONT,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR WRIT OF CERTIORARI

KEN FELIS
*Pro Se*
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Stowe, VT 05672
(802) 253-2246

22pp

## QUESTIONS PRESENTED

1. Does not Article 4 of the United States Constitution, guaranteeing a republican form of government in every State of the United States, permit an individual citizen to bring a legal action against a State in order to assure the continuance of a republican form of government in that State, even though the Eleventh Amendment of the United States Constitution does not generally permit suits against States?

2. If Article 4 of the United States Constitution permits this legal action, is not the Plaintiff entitled to a full and fair hearing of all allegations set forth in the Complaint that he has filed in this action?

## PETITION FOR WRIT OF CERTIORARI

Petitioner, Ken Felis, respectfully petitions this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit, dated March 28, 2000, petition for rehearing denied, May 3, 2000.

## OPINIONS BELOW

Judgment in a Civil Case issued in the matter of *Ken Felis, Jr., et al. v. State of Vermont*, United States District Court for the District of Vermont Case Number: 2:99-CV-43. Summary Order issued in the matter of *Ken Felis v. State of Vermont*, United States Court of Appeals for the Second Circuit Case Number 99-9045.

## JURISDICTION

Petitioner claims that the jurisdiction of this Court for this action is provided by Article 4 of the United States Constitution, which guarantees a republican form of government in every State of the United States.

## CONSTITUTIONAL PROVISION

This case is governed by Article 4 of the United States Constitution.

## STATEMENT OF THE CASE

Petitioner Kenneth Felis and others commenced this action through a Complaint requesting the United States District Court for the District of Vermont issue a Declaratory Judgment confirming the fact that *Brigham v. State*, 166 Vt. 246 (1997), and the Equal Educational Opportunity Act of 1997, 16 VSA §§ 4000 et seq., were unconstitutional. Plaintiff Felis claims that both the *Brigham* case and *Act 60* were arbitrarily issued and/or enacted contrary to the clear language and effect of the Constitution of the State of Vermont. The United States District Court for the State of Vermont dismissed this action, citing the Eleventh Amendment of the United States Constitution. Petitioner Felis claims that the Fourth Amendment of the United States Constitution, guaranteeing a republican form of government in each State, permits this suit.

## REASONS FOR GRANTING CERTIORARI

The Summary Order of the U.S. Court of Appeals for the Second Circuit, filed in this matter on March 28, 2000, and the subsequent denial of Petition for rehearing, filed on May 3, 2000, failed to address two points of law or fact in the referenced Order (attached).

### 1. The Court Failed to Address the Applicability of U.S.C. Art. 4

In its summary order, the United States Court of Appeals for the Second Circuit in affirming the District

Court's decision failed to address the United States Constitution Article 4 "guarantee" of a republican form of government in every state. The complaint filed with the District Court charged that the Vermont Supreme Court in its *Brigham* Decision engaged in an "arbitrary" decision which worked as an effective amendment of the State Constitution while circumventing the requisite constitutional process. The American Heritage Dictionary defines the word arbitrary as "not limited by law; absolute; despotic". This represents a direct charge that the Vermont Supreme Court undermined the frame of government established by the Vermont Constitution. Although the law is well established recognizing a state's Eleventh Amendment immunity, that immunity is trumped by the United States Constitution Article 4 guarantee of a republican form of government. None of the precedents cited by the Second Circuit Court of Appeals or those cited by the State of Vermont which represent the *Rooker-Feldman* doctrine include a similar charge that their state's frame of government has been violated. If a citizen is not allowed to call upon the Article 4 guarantee, then the guarantee is illusory and one of the fundamental purposes of federalism is erased. The interest of the United States in preserving the republican principles in each state is well articulated in Federalist #43 which reads in part as follows:

> In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the

> political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained. But a right implies a remedy; and where else could the remedy be deposited than where it is deposited by the Constitution?

*Id.*

The behavior charged in Plaintiffs' complaint, that the *Brigham* Decision was made arbitrarily represents a despotic invasion of the frame of government established by the Vermont Constitution and therefore is a federal matter.

### 2. The Court Failed to Accept All Material Factual Allegations as True

In an appeal of a dismissal of a complaint on the pleadings, the Appellate Court's review is *de novo* and all material factual allegations in the complaint are accepted as true. See *Jones v. New York State Div. of Military and Naval Affairs*, 166 F3d 45, 49 (2d Cir., 1999). Therefore, the plaintiff's allegation that the *Brigham* Decision was "arbitrary" and that "Brigham's ruling had the effect of amending the Vermont Constitution thereby circumventing the constitutional process" should have been accepted by the Appellate Court as true. This acceptance combined with the Article 4 guarantee of a republican form of government should have caused the Appellate Court to remand the case back to the District Court where a

review of evidence in support of Plaintiff's claim would determine whether or not a factual basis for the claim exists.

## CONCLUSION

Based on the failure of the District Court for the State of Vermont and the Second Circuit Court of Appeals to address the applicability of Article 4 to the United States Constitution and to accept all material factual allegations as true, Petitioner's suit was improperly dismissed and the subsequent appeals improperly denied. The Petitioner, therefore, respectfully petitions the Supreme Court of the United States for a Writ of Certiorari in this matter.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

**(Filed Mar. 28, 2000)**

**THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.**

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of March, two thousand.**

**PRESENT: HON. DENNIS JACOBS,**
**HON. JOSÉ A. CABRANES,**
**HON. SONIA SOTOMAYOR,**
***Circuit Judges.***

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**RALPH F. COLIN, JR.; NATHANIEL TYLER, III; THOMAS P. GLAVIN; RICHARD WERNER and JANE K. CHADWICK,**

***Plaintiffs,***

**99-9045**

**KEN FELIS,**

***Plaintiff-Appellant,***

**-v.-**

**STATE OF VERMONT,**

***Defendant-Appellee.***

---x

**APPEARING FOR APPELLANT:** Kenneth P. Felis, Stowe, Vermont, *pro se*

**APPEARING FOR APPELLEE:** Mark J. Di Stefano, Montpelier, Vermont (Richard A. Johnson, Jr., Assistant Attorney General, on the brief)

Appeal from the United States District Court for the District of Vermont (Sessions, *J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the judgment of the district court be **AFFIRMED**.

Kenneth P. Felis *pro se* appeals from the judgment of the United States District Court for the District of Vermont (Sessions, *J.*) dismissing his complaint against the State of Vermont on the ground that his suit is barred by the Eleventh Amendment.

Felis and his co-plaintiffs (represented by counsel in the district court) brought this suit against the State of Vermont alleging that two actions of the state government worked an effective amendment of the state constitution without the requisite constitutional process. The actions in question were the Vermont Supreme Court's decision in *Brigham v. State*, 692 A.2d 384 (Vt. 1997), which held that the State's locality-based educational financing system violated the right to equal educational opportunity under the Vermont constitution, and the Vermont Legislature's promulgation of the Equal Educational Opportunity Act of 1997, which implemented the

court's *Brigham* decision. Plaintiffs alleged that *Brigham* and the act deprived them of due process and equal protection with respect to their rights to educate their children free from state interference.

The State filed a motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and (6), arguing (*inter alia*) that the suit was barred by the Eleventh Amendment. By report and recommendation, the reviewing magistrate judge recommended that the action be dismissed on the Eleventh Amendment ground. The district court adopted the report and recommendation and dismissed the suit. Proceeding *pro se*, Felis now appeals.

Felis argues that as a Vermont citizen suing Vermont, the Eleventh Amendment is no bar. The text of the Eleventh Amendment would appear to support this argument: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. But the law is clear and long settled: "[T]he Supreme Court has interpreted the Eleventh Amendment to extend to suits by all persons against a state in federal court." *Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 292 (2d Cir. 1996) (citing *Hans v. Louisiana*, 134 U.S. 1, 10-11, 10 S. Ct. 504, 505-06 (1890)). Since the State of Vermont has not waived its Eleventh Amendment immunity for this suit, and the United States has not abrogated the State's immunity, Felis's action against the State in federal court is barred.

For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED.**

FOR THE COURT:
ROSEANN B. MacKECHNIE,
CLERK
By:

/s/ Lucille Carr
Lucille Carr, Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

| | | |
|---|---|---|
| Ken Felis, Ralph F. Colin, Jr., Nathaniel Tyler, III, Thomas P. Glavin, Richard Werner & Jane K. Chadwick, Plaintiffs, | : | Filed No. 99 cv 43 |
| v. | : | |
| State of Vermont, Defendant. | : | |

ORDER

The Report and Recommendation of the United States Magistrate Judge was filed July 30, 1999. Plaintiff Ken Felis timely filed his objections to the Report and Recommendation on August 9, 1999.

A district judge must make a *de novo* determination of those portions of a magistrate judge's report and recommendation to which an objection is made. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1); *Perez-Rubio v. Wyckoff*, 718 F.Supp. 217, 227 (S.D.N.Y. 1989). The district judge may "accept, reject, or modify, in whole or in part, the magistrate's proposed findings and recommendations." *Id.*

After careful review of the file, the Magistrate Judge's Report and Recommendation and the objections, this Court ADOPTS the Magistrate Judge's recommendations in full for the reasons stated in the Report.

Defendant's Motion to Dismiss the complaint is GRANTED because the lawsuit is clearly barred by the Eleventh Amendment (Paper #4).

THIS CASE CLOSED.

Dated at Burlington, in the District of Vermont, this 18 day of August, 1999.

/s/ William K. Sessions, III
William K. Sessions III
U. S. District Judge

**United States District Court**
**District of Vermont**

| | | |
|---|---|---|
| **KEN FELIS, JR., RALPH F. COLIN, NATHANIEL TYLER, III, THOMAS P. GLAVIN, RICHARD WERNER, JANE K. CHADWICK,** | : | **JUDGMENT IN A CIVIL CASE** |
| **Plaintiffs,** | : | CASE NUMBER: 2:99-CV-43 |
| **v.** | : | |
| **STATE OF VERMONT,** | : | |
| **Defendant.** | : | |

_ **Jury Verdict.** This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED** that pursuant to the Court's Order (Paper No. 16) filed August 18, 1999, the Magistrate Judge's Report and Recommendation (Paper No. 12) is ADOPTED. Defendant's Motion to Dismiss the Complaint (Paper No. 4) is granted because the lawsuit is clearly barred by the Eleventh Amendment. JUDGMENT is hereby entered for defendant State of Vermont against plaintiffs Ken Felis, Ralph F. Colin, Jr., Nathaniel Tyler,

III, Thomas P. Glavin, Richard Werner, and Jane K. Chadwick.

RICHARD PAUL WASKO
Clerk

Date: August 18, 1999

Lisa Narsh
(By) Deputy Clerk

JUDGMENT ENTERED ON DOCKET
DATE: 8-18-99

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

| | | |
|---|---|---|
| Ken Felis, Ralph F. Colin Jr., Nathaniel Tyler, III, Thomas P. Glavin, Richard Werner, and Jane K. Chadwick, | : | |
| Plaintiffs, | : | File No. 9-CV-43 |
| v. | : | (Filed |
| State of Vermont, | : | July 30, 1999) |
| Defendant. | : | |

MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION

(Papers 4 and 11)

Plaintiffs have filed a claim against the State of Vermont alleging that the Vermont Supreme Court's decision in *Brigham v. State*, 166 Vt. 246 (1997), denies them their right to due process and equal protection under the Fourteenth Amendment of the United States Constitution. The State has filed a motion to dismiss, arguing, *inter alia*, that the suit is barred by the Eleventh Amendment of the United States Constitution. (Paper 4.) Plaintiffs have also submitted a motion to amend. (Paper 11.)

Based on the following reasons, I recommend the State's Motion to Dismiss be GRANTED. Plaintiffs' Motion to Amend is DENIED.

## BACKGROUND

In *Brigham*, the Vermont Supreme Court decided that the current system used to fund public education in Vermont, "with its substantial dependence on local property taxes and resultant wide disparities in revenues available to local school districts," violated the Vermont Constitution because it deprived children of an equal education opportunity. 166 Vt. at 246. In response to the *Brigham* decision, the Vermont Legislature adopted the Equal Educational Opportunity Act of 1997, 16 V.S.A. §§ 4000 *et seq.*, commonly referred to as "Act 60", which imposes a new educational funding scheme.

Plaintiffs claim that the old system, "whereby schools were both funded and controlled by individual towns, with the State providing a supervisory role to insure adequacy," could only be changed by a constitutional amendment to the Vermont Constitution. (Paper 1, ¶ 12.) They allege that in deciding *Brigham*, the Vermont Supreme Court, in effect, amended the Vermont Constitution, "circumventing the constitutional process." (*Id.*, ¶ 15.) They claim that this action forces them to spend more to educate their children, and denies them their "right to equal protection and due process under the Fourteenth Amendment." (*Id.*, ¶ 16.)

## DISCUSSION

### I. Motion to Dismiss

The State has moved for dismissal, arguing: (1) the action is barred by the Eleventh Amendment; (2) the action is barred under the *Rooker-Feldman* doctrine; (3) there is no justiciable case or controversy; and (4) the

complaint fails to state a substantial and non-frivolous federal question to sustain jurisdiction under 28 U.S.C. § 1331. Because I find that this lawsuit is clearly barred by the Eleventh Amendment, the State's other arguments need not be addressed.

The Eleventh Amendment has long been interpreted to bar federal jurisdiction over suits brought by individuals against a state. *See College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 67 USLW 4590, 4591 (June 23, 1999) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)). While the sovereign immunity of states is not absolute, the Supreme Court has recognized only two circumstances in which an individual may sue a state: where the state specifically waives its immunity by consenting to suit, or where Congress authorizes such suits pursuant to its power under § 5 of the Fourteenth Amendment. *See College Savings Bank*, 67 USLW at 4591 (citing *Clark v. Barnard*, 108 U.S 436, 447-48 (1883) and *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

Neither of those two circumstances is present here. First, Vermont has not consented to being sued in federal court, Second, the Plaintiffs' complaint asserts no claim which implicates Congress' power to abrogate a state's sovereign immunity.

Regarding this second circumstance, the plaintiffs contend that their complaint, which alleges violations of the Fourteenth Amendment, should be construed as suit under 42 U.S.C. § 1983. They argue that in enacting § 1983 pursuant to Section 5 of the Fourteenth Amendment, Congress abrogated the state's immunity under the Eleventh Amendment.

Even if the Court does read a § 1983 claim into Plaintiff's complaint, it could not be sustained because a § 1983 suit cannot be brought against a state. Section 1983 provides a private right of action against a "person" who, under color of state law, deprives a person of a constitutional right. However, a state is not a "person" within the meaning of § 1983. *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989). The Supreme Court stated in *Will*:

> Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does *not* provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. . . . Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity . . .

*Id.* at 66 (emphasis added).

Plaintiffs only other argument is that the constitutional rights implicated in this case are extremely important, and there is no other forum where they can seek protection of their rights. However, these arguments are not enough to overcome the bedrock principle of sovereign immunity.

## II. Motion to Amend

Plaintiffs have submitted a motion to amend the complaint to correct the identification of some of the plaintiffs. As noted during the oral argument, Plaintiffs failed to comply with Local Rule 15.1. In addition, the motion is mooted by the Court's decision to recommend dismissal of the complaint.

## CONCLUSION

For the foregoing reasons, I recommend the State's Motion to Dismiss be GRANTED, and the Plaintiffs' Motion to Amend is DENIED.

Dated at Burlington, in the District of Vermont, this 30th day of July 1999.

/s/ Jerome J. Niedermeier
Jerome J. Niedermeier
United States Magistrate Judge

Any party may object to this Report and Recommendation within 10 days after service by filing with the clerk of the court and serving on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Failure to file objections within the specified time waives the right to appellate review of the district court's order. *See* Local Rule, 72.1; 28 U.S.C. § 636(B)(1); Fed. R. Civ. P. 72, 6(a) and 6(e).

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**
**UNITED STATES COURT HOUSE**
**40 FOLEY SQUARE**
**NEW YORK 10007**

Niedermei
Sessions

**ROSEANN B. MACKECHNIE**
**CLERK**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of May two thousand

Present:

Hon. Dennis Jacobs,
Hon. José A. Cabranes,
Hon. Sonia Sotomayor,

CIRCUIT JUDGES,

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Felis

Plaintiff - Appellant,

Docket No. 99-9045

v.

State of Vermont,

Defendant - Appellee.

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(Filed May 3, 2000)

A petition for panel rehearing having been filed herein by Kenneth P. Felis,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

**FOR THE COURT**
**ROSEANN B. MACKECHNIE,**
**Clerk**

**By: /s/ Beth J. Meador**
**Beth J. Meador,**
**Administrative Attorney**